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No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

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TEXTBOOKS AND MISCELLANEOUS:

Architectural Forum, May, 1941, editorial, pp. 333-335 (Vol. 74) 23

Factory Management & Maintenance, March, 1942 issue, article entitled "*Lighting Takes On New Significance*," Vol. 100, No. 3, p. 101 22

Foundry, The, article entitled "*Dirt on Windows Causes Loss of Daylight*," Vol. 63, p. 89, August, 1935 27

Industrial Management, by Richard H. Lansburgh and William R. Spriegel, Ph.D. John Wiley & Sons, Inc., N. Y. 1940, p. 163 25

Industrial Engineering, March, 1931 issue, article entitled "*Clean Windows: Most Daylight*," Vol. 89, No. 3 26

Interpretative Bulletin No. 6, issued by the Wage and Hour Division, United States Department of Labor 8

Management of an Enterprise, by C. Canby Balderstrom, Victor S. Karbosz, and Robert P. Brecht, Prentice-Hall, Inc., N. Y. 1937, p. 145 25-26

National Safety News, March, 1940 issue, Vol. 41, No. 3, P. 88 23

Safety Engineering, September, 1937 issue, pp. 13-14, article entitled "*Clean Windows for Safety*," by E. W. Canover, research engineer, Detroit Steel Products Company 26

Transactions of Illuminating Engineering Society, Vol. 22, 1927, pp. 239-257, paper entitled "*Making Your Windows Deliver More Daylight*" 24

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PETITIONERS' BRIEF

OPINIONS BELOW

The opinion (R. 17-21) of District Judge Frank A. Picard dismissing the complaint is reported at 51 F. Supp. 505. Judge Picard's first opinion may be found at R. 14-16 and his Judgment and Findings At Law at R. 21-22.

The judgment of the Circuit Court of Appeals for the Sixth Circuit (before Simons, Hamilton, and Marton, JJ.) affirming the District Court (R. 27) is reported at 145 F. (2d) 163.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered on October 18, 1944 (R. 27). Certiorari was granted by this Court on June 18, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether employees of a window cleaning concern who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce" and are therefore within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a window cleaning concern who spend the greater part of their time cleaning windows in buildings in which goods are produced for interstate commerce are engaged in "any process or occupation necessary to the production" of goods for commerce within the meaning of the Fair Labor Standards Act.

3. Whether judgment dismissing the complaint on the court's own motion was proper.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. Sec. 201. et seq.) are set forth in Appendix I, *infra*, pp. 34-35.

STATEMENT

This case arises from an action filed by Thomas Martino for himself and in a representative capacity in behalf of 23 other employees similarly situated, under Section 16 (b) of the Fair Labor Standards Act of 1938, in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover unpaid overtime compensation, liquidated damages, attorney's fee, and costs.

Respondent is a Michigan corporation engaged in the business of cleaning windows in industrial buildings located in the State of Michigan (R. 16). Petitioners were employed by respondent as window cleaners and assigned to clean windows in various commercial and industrial buildings whose occupants were under contract with respondent for such work (R. 9). Most of these customers, such as various units of General Motors Corporation, were "definitely engaged in the production of goods for interstate commerce" (R. 9, 16). It is admitted that the greater portion of the work done by petitioners and by respondent was performed on buildings in which production of goods for interstate commerce was carried on, and that this was true measured in terms of receipts from business, in terms of volume of work done, and in terms of the number of customers under contract (R. 17).

Despite the provisions of the Fair Labor Standards Act which require payment of time and one-half for more than 42 hours in any workweek beginning October 24, 1939 and for more than 40 hours in any workweek beginning October 24, 1940 (Sec. 7(a) *infra*, p. 35) petitioners were not paid time and one-half until after 44 hours of work.

A stipulation (R. 16-17) was entered into in the district court that:

> "B. * * * the greater portion of the work done by [respondent] and by [petitioners] under direction of [respondent] was for customers who were engaged in the production of goods for interstate commerce and most of whose employees were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.
>
> "C. * * * the foregoing is true both as to the volume of work done by [respondent], in terms of

> money paid to [respondent] by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce as against those customers of [respondent] not so engaged."

At the direction of the district judge, petitioners renewed a motion for summary judgment (R. 17). The district judge denied the motion, holding that respondent is a service establishment and that petitioners' work, even when performed for producers of goods for interstate commerce, did not constitute servicing in commerce (R. 17-21). At the same time the court dismissed the complaint (R. 21-22).

Petitioners thereupon appealed (R. 22) to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the dismissal without opinion (R. 27).

SPECIFICATION OF ERRORS WHICH ARE URGED

It is submitted that:

1. The courts below erred in holding that petitioners, who are employed by a window cleaning concern, and who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce, are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce," and that the employer is therefore within the exemption of Section 13(a) (2) of the Fair Labor Standards Act.

2. The courts below erred in holding that petitioners, who spend the greater part of their time cleaning windows in buildings in which goods are produced for interstate commerce, are not engaged in "any process or occupation

necessary to the production" of goods for commerce within the meaning of the Act.

3. The district court below erred in dismissing the complaint on its own motion although no proofs had been taken.

SUMMARY OF ARGUMENT

Petitioners are not engaged in a service establishment within the exemption provided by Section 13 (a) (2) of the Act, for a number of reasons. Work that is in commerce or in the production of goods for commerce is outside the purview of an exemption intended to exclude services rendered to the consuming public. The type of service contemplated by the Act is that offered by tailor shops, beauty parlors, and the like.

The service establishment intended by the exemption is one in which the service is rendered in its own establishment, and a service which entails sending employees into the establishments of customers is not exempted. Respondent is not a service establishment because, by the very nature of its business, it has no service to render in its own establishment. It can operate only by assigning its employees to work elsewhere.

In any event the greater part of its work is rendered in establishments of those of its customers who are engaged in the production of goods for interstate commerce, so that even if respondent could be called a service establishment, it would still be outside the exemption.

Petitioners are engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of the Act. Factory windows must be cleaned, lest the depreciation of daylight interfere with production or, in the alternative, necessitate increased reliance on arti-

ficial light, which in turn adds to the cost of production. The work of window cleaning is necessary to health and safety of factory workmen. Clearly if petitioners had been employed directly by respondent's customers, they would have been covered by the Act. Excluding them because of the interjection of an independent contractor must therefore open the door to evasion of a remedial Act which requires liberal interpretation.

Judgment was improperly entered below dismissing the complaint on the court's own motion since no proofs had been taken, although on the stipulated facts summary judgment should have been entered for petitioners.

ARGUMENT

I.

PETITIONERS ARE NOT ENGAGED IN A SERVICE ESTABLISHMENT WITHIN THE EXEMPTION PROVIDED IN SECTION 13 (a) (2)

Section 13 (a) (2) of the Act provides in part that:

> "The provisions of Sections 6 and 7 shall not apply with respect to * * * (2) any employe engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * * "

In order to receive the benefit of this exemption, respon- must meet three requirements:

FIRST the service rendered must be the kind of service contemplated by the Act.

SECOND the greater part of servicing must be in intra- state commerce.

THIRD the servicing must be rendered in a service es- ment.

These will be discussed in order.

1. The Act does not contemplate exemption of industrial services.

The word "service" is easily susceptible to misconstruction. Every worker with hand or brain sells his services. The metal polisher who finishes fenders in a Fisher Body plant, the Dodge worker who assembles motors, the Ford workers who grind pistons—all sell their services to their respective employers. Obviously the word "service" calls for delineation. And as the Sixth Circuit held in a case in which a newspaper publishing company sought to claim the exemption,

> * * * In the broader sense, every business is of service to the public, but as the term "service" is used in the Act the type of business exempted as a service establishment is comparable to barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like. *Sun Publishing Co. v. Walling*, 140 F. (2d) at 447.

And as the Administrator of the Act says in Interpretative Bulletin No. 6[1], after listing in Section 29 (p. 9) a large variety of industrial and business concerns,

> 30. In a broad sense every business performs service, yet no one would seriously urge that all types of businesses were eligible for exemption under section 13 (a) (2). It would be surprising indeed if Congress had intended by the one word "service" as used in the phrase "retail or service establishment" to grant an exemption broad enough to include all the above mentioned classes of business, and there is nothing in the legislative history of section 13 (a) (2) to support such a conclusion.

And in section 27 (p. 8) of this Bulletin we find:

> * * * establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for personal or family use.

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[1] This Court has repeatedly said that the interpretative bulletins of the Administrator are entitled to great weight. *U. S. v. American Trucking Associations*, 310 U. S. 534. And more recently, in *Skidmore et al v. Swift & Co.*, 65 S. Ct. 161, this Court held that "We consider the rulings, interpretations, and opinions of the Administrator under the Act, while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade, if lacking power to control."

And in section 23 (p. 7):

> * * * Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually rendered in small quantities for private use rather than for industrial or business purposes. Further, the service is usually rendered at a "retail" price.

Section 24 (p. 7) gives a number of typical examples of service establishments and then goes on to say:

> * * * These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise.

This Court drew the distinction in *Phillips v. Walling*, 323 U. S. — between the type of establishment contemplated by the exemption and the type of enterprise operated by respondent. In that case the exemption was claimed by a chain store enterprise with respect to its warehouse employes as well as its retail store employes. And this Court said:

> * * * from the standpoint of its legislative ancestry, Sec. 13 (a) (2) is the offspring of a manifest desire to exclude from the scope of the Act "business in the several states that is of a purely local nature." * * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed in small retail establishments epitomized by the corner grocery, the drug store, and the department store.

But the circuit court below went far beyond this area in holding that it was unable "to reject the concept that a window cleaning company is a service establishment, under Sec. 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas v. National Linen Service Corp.*, 136 F. (2d) 433. Cert. denied 320 U.S. 785[2]." (R. 27.) There is wide factual variance between the *Lonas* case and the case at bar. The *Lonas* record showed 60% of the work rendered for "industrial or business establishments," and for aught the court might know most of these customers might have been purely local concerns such as barber shops or retail stores. In the case of respondent, on the other hand, it is admitted (R. 16-17) that *the greater part of the work done by both petitioners and respondent was for factories engaged in the production of goods for interstate commerce.* Another pivotal difference is that if the *National Linen Service Corp.* was a service establishment, its employees were undeniably *engaged in* it. On the other hand, if respondent is a service establishment, petitioners are undeniably employed by it, but engaged elsewhere, the very nature of their work taking them into factories with which respondent is under contract.

There is yet another difference. The *Lonas* decision was based on the belief that the normal functions of a laundry and linen supply company are indistinguishable from the businesses, uniformly regarded as falling within the exemption, such as barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like, (*Sun Pub. Co. v. Walling, supra; Flem-*

[2] No inference may be drawn from the denial. As this Court held in *U. S. v. Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line R. R. Co. v. Powe*, 283 U. S. 401, "But the denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times."

ing v. Kirschbaum, 124 F. (2nd) 567 (CCA 3); *Bracey v. Luray*, 138 F. 2nd 8 (CCA 4); *Guess v. Montague*, 140 F. (2nd) 500; (CCA 4) and upon the fact that laundries and linen supply companies have been included among such busineses by "Federal Departments and Agencies, as well as by trade associations and the public." See 136 F. (2d) at 434.

But respondent's business has not been classified by Federal agencies in the same category as laundries, barber shops, and other personal service businesses. On the contrary, the 1939 Census lists "window cleaning services" under "Business Services", along with "protective agencies" and "detective agencies" such as defendants in the *Sondock* case and other cases cited *infra* on p. 19, "auctioneers' establishments" (held outside the exemption in *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E.D.Ky.); *Walling v. Lincoln Loose Leaf Tobacco Warehouse Co.*, 6 Wage Hour Rept. 68 (E.D. Ten., 1943); *Walling v. Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E.D. Ky)), "messenger services" (held outside the exemption in *Walling v. Allied Messenger Service*, 47 F. Supp. (S.D. N.Y.) "employment agencies" (held outside the exemption in *Yunker v. Abbye Employment Agency*, 32 N.Y.S. (2d) 715 (Munic. Ct. N.Y. 1942)), "duplicating, addressing, mailing, and mailing list services" (see *Hanzley v. Hooven Letters*, 44 N.Y.S. (2d) 398 (City Ct. N.Y. 1943)), etc.

But in the first instance, the Sixth Circuit stands virtually alone in the position taken in the *Lonas* case that the private or industrial character of the service rendered has no bearing on the applicability of the exemption. In contrast we have the position of the Second Circuit, *Fleming v. Arsenal*, 125 F. (2d) 278, discussed *infra*, p. 14, the Third Circuit, *Fleming v. Kirschbaum*, *supra*, discussed *infra*,

p. 13 the Fourth Circuit, *Guess v. Montague, supra,* discussed *infra,* p. 13, the Fifth Circuit, *Walling v. Sondock,* 132 F. (2d) 77, cert. denied 318 U.S. 772, discussed *infra,* p. 19, and the Ninth Circuit, *Consolidated Timber Co. v. Womack,* 132 F. (2d) 101, discussed *infra,* p. 15.

This Court established the principle that *activities which are part of interstate commerce or the production of goods for interstate commerce are outside the exemption* in *McLeod v. Threlkeld,* 319 U.S. 491. In this case the Court denied coverage to a cook engaged by a contractor to provide meals for maintenance-of-way workers on an interstate railroad. At the same time, however, the Court disposed of the service establishment defense by holding (at p. 494) that:

> The contention that the work of the employee is covered by the exemption of 13 (a) (2) * * * seems without significance. If the work is in interstate commerce, the exemption does not apply.

And in *Walling v. Jacksonville Paper Co.,* 317 U.S. 564 this defense was rejected by this Court, at p. 571:

> It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near state lines and making some interstate sales.

Although the foregoing authorities relate directly to the word "retail" in the exemption section, no significant difference should attach as there is little doubt that Congress included the word "service" because of the fact that many enterprises catering to the consuming public sell a service, rather than a tangible commodity. A barber shop and a butcher shop may exist side by side in Texarkana. Both may have the same essential character of serving the consuming public, although one sells a commodity at retail

and the other a service at retail. The fact that geographical location predisposes some interstate transactions raised a question in Congressional thought which was resolved by adding Section 13 (a) (2) to the Act. But Congress did not intend to exclude services that are rendered to industrial establishments and which form part of an industrial pattern, as is true in the case at bar. A similar question arose in the Fourth Circuit in *Guess v. Montague*, 140 F. (2d) 500, where the exemption was claimed for a machinery repair shop in which machinery was repaired for customers, repair parts and rebuilt and second-hand machinery was sold. The machinery involved was used in manufacturing. In this case the court held:

> On the principle *noscitur a sociis* the service establishment contemplated by the exemption must be the same sort as a retail establishment * * * that is, it must be one selling services to consumers. The exemption does not extend to manufacturing or processing goods for sale, or to production within the meaning of Sec. 3 (j).

And the Third Circuit also ruled squarely on this point in *Kirschbaum v. Walling*, 124 F. (2d) 567 where the facts were even closer to those at bar. In that case an Administrator's suit was brought to enjoin violations of the Act by a loft building which was tenanted by producers of goods for commerce. The employees in question included porters, elevator operators, and other maintenance workers. There it was held that:

> * * * By "service establishments" Congress intended that type of establishment which has the ordinary characteristics of a retail establishment except that it sells services instead of goods.

Respondent would have the Court view its activities in a vacuum, in disregard of the relationship to the factories

it serves. It is not respondent's normal function to cater to personal needs, for windows in private homes are almost invariably washed by members of the household or domestic servants. And it is admitted that respondent's chief function is to serve industrial establishments wherein goods are produced for commerce.

Thus the real question in this case is whether occupations which are "necessary to the production" are to be excluded from the Act because of the capricious circumstances that the operation is farmed out to a contractor who says "I do not produce; I have nothing to sell but a service." If window cleaning is the sort of service contemplated by the exemption, what is there to prevent a factory from contracting out its floor sweeping, the operation of its elevators, its electrical maintenance, and a variety of other operations, with the result that coverage under the Act will no longer depend on the character of the employee's activities, as Congress intended, and this Court has repeatedly held? *Kirschbaum v. Walling, supra, Warren Bradshaw Drilling Co. v. Hall,* 317 U.S. 88, *Overstreet v. North Shore RR.*, 318 U.S. 125.

As the Second Circuit analyzed this point in *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278 at 280, affirmed by this Court *sub nom. Kirschbaum v. Walling, supra,*

> Nor do we think that the defendant is a "service establishment the greater part of whose * * * servicing is in intrastate commerce"; Sec. 13 (a) (2). Possibly it is not a "service establishment" at all. Perhaps the phrase should be limited to those who serve consumers directly, like tailors, garages, or laundries; the juxtaposition of retail selling and "servicing" does indeed suggest as much. But it is enough for our purposes that, if it is a "service establishment" at least its exemption must depend upon the extent to which its servicing is intrastate.

> Suppose, for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be "in interstate commerce." The "servicing" being a part of "production" the test should be what kind of production it is a part of. The question is really the same as that we have just considered: i. e. whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail "servicing," it is the character of the "servicing" itself that counts, divorced from the "production" of which it is a part. Again, we are met by the anomaly arising from such an interpretation—the capricious incident of the act resulting from the accident of the industrial division of the whole process.

Also in support of our contention is the language of the Ninth Circuit in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101 at 107:

> * * * It here occurs to us that perhaps it may not truthfully be said that the greater part of the servicing of either cookhouse was in interstate commerce. Was not the greater number of diners at the cookhouses engaged in the production of goods for commerce? Were not the cookhouses an integral part of an organization devoted to the production of goods for commerce? Does it not follow, reasonably and logically, that the greater part of the service rendered by the cookhouses was in interstate commerce rather than intrastate?

Petitioners' position herein finds further support in the decision of the Fourth Circuit in *Walling v. Roland Electrical Company*, 146 F. (2d) 745 and of the Sixth Circuit in *Boutell v. Walling*, 148 F. (2d) 329, both of which are pend-

ing on certiorari this Term. In both cases the employees were held to be covered by the Act, and in both cases the defense of Section 13 (a) (2) was rejected by the respective courts. Yet the material facts in both cases are essentially the same as those at bar. In the *Roland* case the the employer's business consisted of repairing, rebuilding, and reconditioning of motors, and in the installation, relocation, extension and repair of electrical wiring used in the production of goods for commerce. In the *Boutell* case the employer was in the business of servicing motor transportation equipment owned and operated by a corporation which used the equipment in interstate commerce. The Sixth Circuit rejected the service establishment defense, holding "We think the mechanics who service the vehicles which operate in interstate commerce are clearly part of it."

The court held in the *Roland* case (1) that the employees were engaged in the production of goods for commerce within the meaning of the Act; (2) that the employer was not a service establishment since "the labor of its employees was performed almost altogether in rendering services to commercial and industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as part of the price of the product; (3) finally, the court held that since the service was rendered to commercial and industrial concerns, "even if the company could be held to be a service establishment within the meaning of this exemption, the greater part of the servicing was not in intrastate commerce, but in the production of goods for interstate, and the exemption did not apply to it for that reason."

The *Roland*, the *Boutell*, and the instant case are marked by common denominators on the relevant data on which coverage turn. In all three cases the employees in question are separated from the purely physical aspects of production by the fact that their employers are independent contractors who produce no visible, tangible product that enters the channels of commerce. In all three cases the occupations in which the employees engage are necessary to the production of their employers' customers. In all three cases the services rendered are industrial, rather than personal in character. Clearly, the the three cases are indistinguishable and if, as we believe, the *Roland* and *Boutell* cases were correctly decided, there was error in the dismissal of the case at bar.

2. ***Even if respondent is a "service" establishment, it is not within the scope of Section 13 (a) (2) because "the greater part of its * * * servicing is [not] in intrastate commerce."***

Not all service establishments are exempted from the Act, but only those "the greater part of whose * * * servicing is in intrastate commerce." Manifestly therefore Congress contemplated two kinds of servicing: that which is in commerce, and that which is not. If the view urged by respondent is correct then it might be said that there is no such thing as "servicing in commerce" and that the modifying language in the exemption section is without meaning.

The district court held that in order for respondent to lose the exemption, it would have to send its employees out of the state to do their work, a position that disregards

petitioners' necessary relationship to production and which narrows[3] the scope of the Act.

Attention is again directed to the stipulated facts that:

> B. * * * the greater portion of the work done by [respondent] and by [petitioners] under direction of [respondent] was for customers who were engaged in the production of goods for interstate commerce and most of whose employees were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.
>
> C. * * * the foregoing is true both as to the volume of work done by [respondent] in terms of money paid to [respondent] by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce as against those customers of [respondent] not so engaged. (R. 16-17).

It thus follows that even if respondent is a service establishment, it fails to meet the second test, namely, that the greater portion of its servicing be in intrastate commerce.

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[3] It is well established that the Fair Labor Standards Act, which is remedial in nature, is to be liberally construed as to coverage whereas exemptions are subject to strict construction. This Court disposed of any doubts herein when it held in *Phillips v. Walling, supra*, that "The * * * Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able bodied working men and women a fair day's pay for a fair day's work' *Message of the President to Congress, May* 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the statutory language and intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." In *Bowie v. Gonzales*, 117 F. (2d) 11 (CCA 1) the court held that the Act being remedial, all employers who claim exemptions "must bring themselves within both the letter and the spirit of the exemptions since they are subject to strict construction." And in *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52, it was held "Sec. 13 (a) (2) creates an exemption to the general scope of the Act and hence is subject to strict construction. In *U. S. v. Dickson*, 10 L. Ed. 689, it is said, 'In short, a proviso carves special exemptions only out of the enacting clause; and those who set up any exemptions must establish it as being within the words as well as the reason thereof.'" See also *Piedmont & Northern Ry. v. Interstate Commerce Commission*, 286 U. S. 289, 311, 312; *Fleming v. Palmer*, 123 F. (2d) 749 (CCA 1).

By respondent's own admission, most of its work is rendered to its manufacturing customers, who engage respondent because they regard its services as necessary to their respective production operations.

It is well established that the service establishment exemption does not apply where an outside contractor undertakes to furnish employees who render a service in establishments engaged in the production of goods for commerce.

In *Walling v. Sondock*,[4] 132 F. (2d) 77 (CCA 5), cert. denied 318 U.S. 772, the facts were almost identical to those at bar. There the employer engaged in the business of furnishing guards or watchmen to various customers in and around Houston, Texas. The customers were engaged in production of goods for commerce. The employer claimed, as does respondent, that the exemption should apply since he was an outside contractor, his business was nominally intrastate, neither he nor any of his employees left the state of Texas, and none of the employees was engaged in actually handling goods in any way. And the Circuit Court held:

> Based on the authority of *Kirschbaum v. Walling supra*, and by analogous reasoning, we hold that these employees are not engaged in a service establishment within the meaning of Section 13 (a) (2),

[4] See also *Walling v. Wattam* (WD Tenn., Oct. 15, 1943) 6 Wage Hour Reporter 1119, *Hanson v. Lagerstrom*, 133 F. (2d) 120 (CCA 8), *Consolidated Timber Co. v. Womack, supra, Haley v. Central Watch Co.* (ND Ill. Jan. 26, 1944), 7 Wage Hour Reporter 144, *Walling v. New Orleans Private Patrol Service*, 57 F. Supp. 143. In the *Haley* case, the court held that "I do not believe that the business of furnishing employees to others is a servicing business."

3. Respondent's employees are not within the scope of the exemption for the further reason that they are not "engaged in" any establishment devoted to a service business.

By its very terms the exemption section has no application to persons *employed by* service establishments. On the contrary, the section provides:

> The provisions of Sections 6 and 7 shall not apply with respect to * * * (2) any employee *ENGAGED IN* any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. * * * (emphasis supplied).

As we have shown (see footnote 3, p. 18, *supra*) the exemption is to be strictly construed, and such interpretation is to be given as to minimize the excluded area. This Court has already defined the word "establishment" as it is used in the exemption. In *Phillips v. Walling, supra,* it was held:

> Petitioners claim that its retail stores, warehouse, and central office together constitute a "retail establishment" within the meaning of the exemption. The lack of merit in this claim is obvious. * * * If, as we believe, Congress used the word "establishment" as it is normally used in business and in government, as meaning a distinct, physical place of business, petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. * * *

And the Sixth Circuit held in *Fletcher v. Grinnell Bros.*, 150 F. (2d)——on July 9, 1945 that the term "establishment" as used in Section 13 (a) (2) of the Act means a single, distinct place of business and in the case of a chain store does not mean the organization as a whole.

Obviously petitioners are not engaged in respondent's establishment. Factory windows cannot be "sent to the laundry." Respondent's entire *modus operandi* is to assign

petitioners to various factories to do their work. Indeed, it is very common for petitioners not even to appear at respondent's establishment at all, except to pick up their paychecks.

In other words, if it is assumed that respondent is indeed a "service establishment," petitioners are employed by it, but *engaged elsewhere.* They are engaged in the factories which are under contract with respondent, and it can hardly be said that these manufacturing plants, in which petitioners are engaged, are service establishments.

When considerations of administrative practicality are taken into account, in terms of legislative resolution to enact a law that could not easily be circumvented, rhyme and reason enures to the meticulous choice of words exercised by the Congressional committees that fashioned the Act. Petitioners submit that the phrase "engaged in" was deliberately chosen in preference to "employed by" in order that the exemption section should also reflect the criterion of coverage implicit in the entire Act, namely the character of the employee's activities.

Thus it is settled beyond cavil that were petitioners employed directly by respondent's customers, they would be covered by the Act, *Walton v. Southern Package Corp.*, 320 U.S. 540, *Armour & Co. v. Wontock*, 323 U.S. 126. For respondents to prevail here would open the door to the possibility of widespread evasions of the Act by use of the independent contractor device. But it is submitted that Congress had this very danger in contemplation when it resolved to limit the scope of the exemption to employees *engaged in* service establishments, thereby anchoring coverage to the broad area of production, independently of the nature of the employer's business, in order that no manipulation of employer entities could serve to defeat the Act.

II.

PETITIONERS ARE ENGAGED IN A "PROCESS OR OCCUPATION NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT.

The Court will take judicial notice of the importance of clean windows in industrial establishments and its effect on the quantity and quality of production. And it would in any event be anomalous indeed for respondent to contend that the enterprise in which it has engaged successfully for many years is "unnecessary" and that respondent and a dozen similar concerns engaged in identical work in Detroit, whose gross receipts aggregate many millions of dollars annually, and who deal almost exclusively with thrifty and pragmatic industrialists, are engaged in a business which is, perhaps, a mere frill that may easily be dispensed with. As this Court held in *Armour & Co. v. Wontock, supra*, at p. 130,

> A court could not readily assume that a corporamanagement was spending stockholders' money on a mere hobby or an extravagance.

And there is ample authority for the contention that respondent's customers were well advised in keeping their windows clean. An editorial in the March, 1942 issue of *Factory Management and Maintenance* entitled "Lighting Takes on New Significance" (Vol. 100, No. 3, p. 101) states:

> * * * Good lighting will increase the quality of production. Machine setting, instrument reading, inspection, typify jobs that will be done better.
>
> Good lighting will increase the effective hours spent on the job. Elimination of eye strain and eye fatigue will reduce both absenteeism and low production work, and more hours will be worked because of fewer lost-time accidents.

> Good lighting will increase morale. Good lighting and good cheer go together. Satisfied workers spend more time on the job and turn out more production than do dissatisfied ones.
>
> Good lighting will increase the effectiveness of supervision. Industry's foremen, of which there are all too few, will be able to see more of their operators and machines at one time, and will be able to supervise more workers.

The importance of windows to lighting is shown in an editorial in *Architectural Forum* for May, 1941, (Vol. 74, pp. 333 and 335) which states in part that:

> Properly controlled sunlight and light from the sky are still the standard of lighting quality and color and diffuse daylight the ideal light source.

Also in *National Safety News*, organ of the National Safety Council, Inc., March, 1940 issue (Vol. 41, No. 3, p. 88) we find:

> Adequate daylight, properly applied, is the ideal light. * * *
>
> *Windows and skylights soon become covered with dirt and dust and the natural light is often decreased below the level needed for safety and efficiency. Thus, regular window cleaning should be part of the routine of every establishment.* (Emphasis supplied.)

That window cleaning is necessary from the standpoints of cleanliness and morale is well recognized. And it would seem self evident that the necessity goes far deeper, relating to the very kernel of efficient factory management and maintenance. Any need for speculation herein was erased,

however, when a scientific and specialized study[5] was made by a group of experts, two from industry and the third on the faculty of a university. The conclusions thus reached and reported to the convention of the Illuminating Engineering Society, are highly significant to the questions at bar. The report reads, in part (pp. 239-240):

> * * * The amount of light transmitted through glass decreases with the amount of dirt deposited on the glass and this amount of dirt increases with the time of exposure to dirt laden atmosphere. * * * The actual decrease in transmission of light through glass for various lengths of time * * * as well as information regarding the dirt collecting proclivities of various types of industrial glass is important information in predicting natural illumination. On that account the data presented in this paper were obtained for and by the Department of Engineering Research of the Detroit Steel Products Company and the Department of Engineering Research of the University of Michigan, Professor H. H. Higbie directing this phase of the investigation for the University.
>
> Tests were made at intervals, from clean, of 14, 15, 42, 72, 85, and 121 days. The values of transmission factor for similar glass at the same slope were averaged (292 determinations of transmission coefficient for 52 samples of glass * * * were recorded), the values being those shown in Table 1[6]. In order to determine, for all types of glass, the effect of time and slope, we can average these values.

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[5] "Making Your Windows Deliver More Daylight," a paper presented before the 20th Anniversary Convention of the Illuminating Engineering Society, Spring Lake, N. J., Sept. 7-10, 1926, by W. C. Randall, chief engineer, Detroit Steel Products Co., Detroit, Mich., and Allen J. Martin, illuminating engineer, Engineering Research Department, Detroit Steel Products Company, and appearing on pp. 239-257, Vol. 22, 1927, Transactions of the Illuminating Engineering Society. Professor H. H. Higbie of the Department of Engineering Research of the University of Michigan, directed the investigation.

[6] See Appendix II, p. 37.

Decrease in Light Transmissions

In Fig. 1[7] we have presented graphically the values in Table II in order to show the gradual decrease, for the glass on several slopes of transmission coefficient as the exposure to dirt is continued.

This study, which is authoritative in its field, shows graphically and scientifically the fact that respondent's enterprise has a necessary role to play in industrial Detroit and that its work is necessary to the production for commerce that takes place in the light of windows which petitioneers clean.

Petitioners have been unable to find any scientific study of the subject or textbook in the field of factory maintenance that denies the need for adequate illumination and the essential wisdom of taking full advantage of natural lighting. On the other hand, many authorities stress the need for adequate lighting. Thus,

> Modern management has recognized that effective illumination of the workplace is one of its most productive investments. The modern factory building is designed to make maximum use of natural illumination. There is little question but that defective lighting increases waste, places an unnecessary strain upon employees, and tends to decrease productivity. *Richard H. Lansburgh and William R. Spriegel, Ph. D., in Industrial Management*, page 163[8].

The foregoing authors go on to state in the text that industrial accidents are increased by improper lighting. It is pointed out by C. Canby Balderston, Victor S. Karbosz,

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[7] See Appendix III, p. 37.

[8] John Wiley & Sons, Inc., N. Y., 1940.

and Robert P. Brecht, all of the faculty of the University of Pennsylvania, in Management of an Enterprise, p. 145[9], that

> * * * the necessity of keeping windows clean is * * * all important for natural lighting.

The need for clean factory windows goes far deeper than the superficial reason of mere appearance, as we are told by *Industrial Engineering* in an article entitled "*Clean Windows: Most Daylight:*"[10]

> Outside the plant daylight costs nothing; to get it inside the plant costs money—for windows and the expense of keeping them clean. If for any reason sufficient daylight does not come in to the plant, electric energy must be consumed to make up the difference between the amount of light available and the amount required. Hence there are plenty of reasons aside from the standpoint of appearance for keeping factory windows clean.

And in an article entitled "*Clean Windows for Safety*" by E. W. Canover[11] in *Safety Engineering*:[12]

> For several years we have emphasized the improvement in illumination to be gained by keeping windows clean. * * * Dirt, more than any other thing, can nullify the finest lighting installation and make very inefficient the most expensive and modern lighting device. Whether the lighting is by natural or artificial means, accumulation of dirt on the glass of the light source robs the building of light that has been paid for. * * * From our findings relative to the location of the dirt, we can make the recommendation that windows be washed more frequently from the inside. Since windows are installed for

[9] Prentice-Hall, Inc., N. Y. 1937.
[10] Vol. 89, No. 3, March, 1931.
[11] Research Engineer, Detroit Steel Products Company.
[12] Vol. 74, No. 3, September, 1937, pp. 13-14.

> the purpose of admitting natural light, it is consistent that provision should be made to keep them relatively clean, and maintain a reasonable schedule of washing.

And an article in *The Foundry* entitled "*Dirt on Windows Causes Loss of Daylight*,"[13] points out that window washing results in

> * * * an increase in speed and accuracy of vision and a decrease in fatigue. * * * the proper use of daylight in place of electricity would mean a decided reduction in overhead.

The conception that light and cleanliness are necessary to the production of goods for interstate commerce is by no means new to this Court, which affirmed the Second Circuit in its holding that maintenance workers who render a factory building clean and habitable are within the Act even though they are employed by the building rather than by the producers of goods for commerce who occupy the building. The Second Circuit thus held in *Arsenal Bldg. Corp. v. Walling*, 125 F. (2d) 278:

> Cutters and stitchers cannot work in cold and *filthy* buildings. They must have *light* and power to drive their machines. * * * *Those who make and keep a factory fit for them in these ways are as necessary to production as they are themselves. It would defeat the purposes of the Act to deprive these workers of its protection when they chance to be employed by a different employer as the cutters and stitchers.* (Emphasis supplied.) Affirmed, 316 U.S. 517.

It is submitted that no distinction can be drawn between *Arsenal* employees whose function it was to provide cleanliness and artificial lighting, and petitioners who simul-

[13] Vol. 63, P. 89, August, 1935.

taneously provide clean windows and preserve natural lighting. By any criterion petitioners are engaged in an "occupation necessary to the production" of goods for commerce "in any state."

In the courts below respondent placed great reliance on the fact that petitioners do not actually handle goods in process of production. But this Court has made it abundantly clear the word "production" is not to be so narrowly construed. In *Borden v. Borella*, 65 S. Ct. 1223, coverage was affirmed as to porters, night watchmen, and elevator operators who were employed in a 24 story building owned and operated by the Borden Company and used as office quarters for its advertising, administrative, and kindred departments. And this Court said:

> The only distinction between this case and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed, and controlled, rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance and that it cannot form the basis for concluding that respondent employees are engaged in occupations unnecessary to the production of goods for commerce.
>
> In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved * * *.

It is submitted that no distinction can be drawn between petitioners and the porters in the *Borden* case. On the other hand a significant distinction is to be found as between petitioners and the employees involved in 10 *East 40th St. Bldg. Inc. v. Callus*, 65 S. Ct. 1227. As the Court said,

> Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. * * * To assign the maintenance men of such an office building to the productive process because some portion of the offices in the building may, for the time being, be offices of manufacturing enterprises, is to indulge in an analysis too attenuated for appropriate regard to the regulatory powers of the states which Congress say fit to reserve to them. * * *
>
> But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building or an office building of a manufacturer.

Thus the business of the *10 East 40th St. Bldg.* was the running of a local building. A single and separate entity, anchored with its 48 stories to the bedrock of Manhattan, *its employes at no tme left the building to do their work.* It mattered not at all by whom it was tenanted. Respondent, in contrast, sends petitioners into Detroit's huge manufacturing plants. The building at 10 E. 40th Street is its own excuse for being. Respondent, on the other hand, is part and parcel of Detroit's automobile industry. Deprive respondent of its factory accounts, and it would shrivel immediately into a very small, inconsequential enterprise. It may be said that exclusion of the *10 East 40th Street* employees carves nothing out of the production process, for in that case no independent contractor was interposed between the production and workers whose work is "necessary to the production." In the case at bar, however, both petitioners and respondent, far from being a "purely local business" are part of the life stream of the automobile manufacturing industry. A single building, which rents space to all and sundry, is a distinct, physical, and tangible entity. Unless, as in the case of the *Borden*

building, it is wholly owned by a manufacturer or is occupied by manufacturers, it develops its own character, and its business is itself. But on the principle *noscitur a sociis* respondent at bar is too deeply enmeshed in the producton of its customers to claim truthfully that it stands alone.

One more distinction between *10 E. 40th Street* and respondent merits consideration. In the former, the narrowing of coverage ends with the building itself. But in the case at bar, where is the process to end? What is there to prevent a "purely local concern" in Detroit from engaging in the business of operating elevators, assigning its employees to work inside the automobile manufacturing plants where their sole duty may consist of operating the elevators, and then paying these employees wages lower than those required by the Act, working them any number of hours without overtime payment, and finally evading the scope of the Act because the business of the company is merely to run elevators? If respondent prevails here on the theory of the *10 E. 40th Street* case, where is the line to be drawn?

As the trial court held in the *Kirschbaum* case,

> I do not think Congress transgressed Constitutional limitations in undertaking to deal with certain marginal activities so closely related with production that without regulating them there cannot be a plenary exercise of that power. This relationship is expressed in the phrase "necessary to the production." *Walling v. Kirschbaum*, 38 F. Supp. 204.

Here the court touched on the *sine qua non* of administrative practicality contemplated by Congress. For as we have already said, it can hardly be disputed that petitioners would be within the Act if employed directly by the several factories whose windows they clean. And as the court held in *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128,

reversed on other grounds 137 F. (2d) 742, "Congress could not have intended to exempt a business which contracts to furnish labor to establishments engaged in interstate commerce" since then the Act "could be evaded by the interposition of an independent contractor between the laborer and the interstate business receiving the benefit of his services." Although employment by independent contractors may be legal and at times necessary, the Act is geared to economic function. An employee's rights under the Act may not therefore be made to depend upon the fortuity of his being employed by a contractor, rather than by a manufacturer to whose productive operations he is necessary.

III.

THE COMPLAINT WAS IMPROPERLY DISMISSED ON THE DISTRICT COURT'S OWN MOTION SINCE NO PROOFS HAD BEEN TAKEN

Judgment was entered in the district court on the court's own motion dismissing the complaint (R. 21-22). No proof's were taken on petitioners' contention that they are engaged in a "process or occupation necessary to the producton" of goods for commerce.

Had petitioners not thus been denied the opportunity to present proofs, they would have established the close and intimate tie between window cleaning and the production that takes place within the factories whose windows are cleaned. It would have been shown that a vast business enterprise is here involved whose implications are direct to the intricate interstate network of the automobile manufacturing industry. The proofs would have shown that petitioners hardly ever see respondent's establishment; that they work in the factories with which respondent is under contract. That during the war petitioners were

required to comply with the identical requirements of citizenship as those employed directly by the factories in order to gain entrance into the factories to do their work.

It would have been shown by expert testimony that 75% of the dirt on factory windows is on the inner surface of the glass, so that petitioners must perforce work in the factories, as well as outside. It would have been proved that the failure to wash factory windows results, after a short time, in depreciation to less than one-half the windows' light transmission capacity determined when they are clean. A direct and immediate relationship would have been established betwen window cleaning and efficiency of production. Competent experts on industrial safety would have testified that poor lighting predisposes an industrial plant to an increased accident rate. Moreover it would have been shown that filthy windows detract from employee morale and are thus reflected in decreased production.

It would have been proved that the failure to wash windows means, if adequate illumination is to be maintained, a substantially increased reliance on artificial lighting, which adds to the production cost of the product.

The proofs would have shown that respondent's customers have never absorbed the cost of window cleaning, but have always passed the cost on as part of its cost of production. Moreover that respondent's customers have always deducted the cost of window cleaning from their respective gross incomes for income tax purposes as "ordinary and necessary expenses" under Section 23 (a) of the Internal Revenue Code, and that if respondent had not undertaken to do the work, and if no other outside contractor had been engaged to do it, the factories would have arranged to do it themselves—but that in no event would this necessary work have been left undone.

It is respectfully submitted that if petitioners had been permitted to present evidence on all of the foregoing, the Sixth Circuit would not have found "it impossible to entertain the concept that window cleaning becomes interstate commerce, or is in the pursuance of the production of goods for commerce, by the fact that the windows cleansed are in the manufacturing establishments of industries engaged in interstate commerce."

For all of these reasons it is submitted that there was error in the dismissal of the complaint on the district court's own motion. Petitioners submit that the stipulated facts are sufficient fully to warrant reversal of the judgment below with directions to enter judgment for petitioners. In no event, however, should the complaint have been dismissed without petitioners having been accorded an opportunity to take testimony.

CONCLUSION

It is therefore submitted that:

1. Petitioners are not engaged in a service establishment within the exemption provided by Section 13 (a) (2) because industrial services were not contemplated by the exemption section.

2. Even if it could be said that respondent is a service establishment, it is nevertheless without the exemption because the greater part of its "servicing" is admittedly not in intrastate commerce.

3. Petitioners are outside the exemption for the further reason that they are not "engaged in" any establishment devoted to a service business.

4. Petitioners are engaged in a "process or occupation necessary to the production" of goods for commerce within the meaning of the Act.

5. The complaint was improperly dismissed on the district court's own motion, since no proofs had been taken.

For these reasons the judgment below should be reversed.

Respectfully submitted.

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DANIEL D. CARMELL,
Of Counsel.

APPENDIX 1

STATUTE INVOLVED

The following are pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C., Sec. 201 et seq.:

Sec. 3. As used in this Act—

* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 13 (a)—The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

Sec. 16 * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plantiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX II

PERCENTAGE-WISE DEPRECIATION OF DAYLIGHT THROUGH WINDOWS, BASED ON TIME INTERVALS AFTER WASHING

(After Randall, Martin & Higbie, see p. 24)

TYPE OF GLASS	DEGREES SLOPE FROM VERTICAL							DAYS SINCE CLEAN
	0°	15°	30°	45°	60°	75°	90°	
1/8" CLEAR	0.820	0.840	0.904	0.836	0.790	0.824	0.861	0
1/8" FROSTED	0.762	0.704	0.807	0.760	0.831	0.788	0.650	
1/8" V. R. GREEN	0.880	0.846	0.816	0.812	0.728	0.699	0.643	
1/8" ROUGH OR CHANNELED	0.871	0.807	0.770	0.785	0.722	0.746	0.810	
1/8" CLEAR	0.829	0.640	0.584	0.553	0.535	0.438	0.495	14
1/8" H. R.	0.780	0.627	0.662	0.520	0.474	0.528	0.408	
1/8" V. R.	0.730	0.669	0.574	0.473	0.483	0.441	0.400	
1/8" R OR H	0.700	0.545	0.572	0.510	0.446	0.531	0.396	
1/4" CLEAR	0.790	0.77[illegible]	[illegible]89	0.604	0.565	0.565	0.573	15
1/4" H. R.	0.665	0.665	0.[illegible]0	0.588	0.503	0.508	0.544	
1/4" V. R.	0.745	0.750	0.[illegible]5	0.629	0.524	0.483	0.544	
1/4" R OR H.	0.805	0.767	0.556	0.710	0.517	0.556	0.625	
1/8" CLEAR	0.651	0.569	0.528	0.449	0.427	0.367	0.364	42
1/8" H. R.	0.676	0.566	0.431	0.429	0.445	0.370	0.347	
1/8" V. R.	0.716	0.464	0.424	0.400	0.416	0.335	0.292	
1/8" R OR H.	0.673	0.433	0.467	0.469	0.484	0.382	0.370	
1/8" CLEAR	0.581	0.701	0.441	0.394	0.318	0.368	0.389	72
1/8" H. R.	0.517	0.630	0.345	0.310	0.299	0.259	0.312	
1/8" V. R.	0.554	0.498	0.380	0.358	0.330	0.316	0.270	
1/8" R OR H.	0.571	0.531	0.410	0.361	0.355	0.296	0.322	
1/8" CLEAR	0.556	0.412	0.378	0.274	0.283	0.258	0.236	86
1/8" H. R.	0.506	0.425	0.353	0.316	0.278	0.278	0.229	
1/8" V. R.	0.513	0.406	0.362	0.260	0.285	0.257	0.232	
1/4" R OR H.	0.589	0.426	0.384	0.320	0.287	0.256	0.266	
1/8" CLEAR	0.435	0.316	0.332	0.244	0.264	0.217	0.270	121
1/8" H. R.	0.418	0.264	0.281	0.246	0.244	0.247	0.254	
1/8" V. R.	0.428	0.269	0.261	0.254	0.240	0.246	0.264	
1/8" R OR H.	0.482	0.270	0.266	0.252	0.238	0.240	0.251	

TABLE I - EXPERIMENTALLY DETERMINED TRANSMISSION FACTORS.

APPENDIX III

(After Randall, Martin & Higbie, see p. 24)

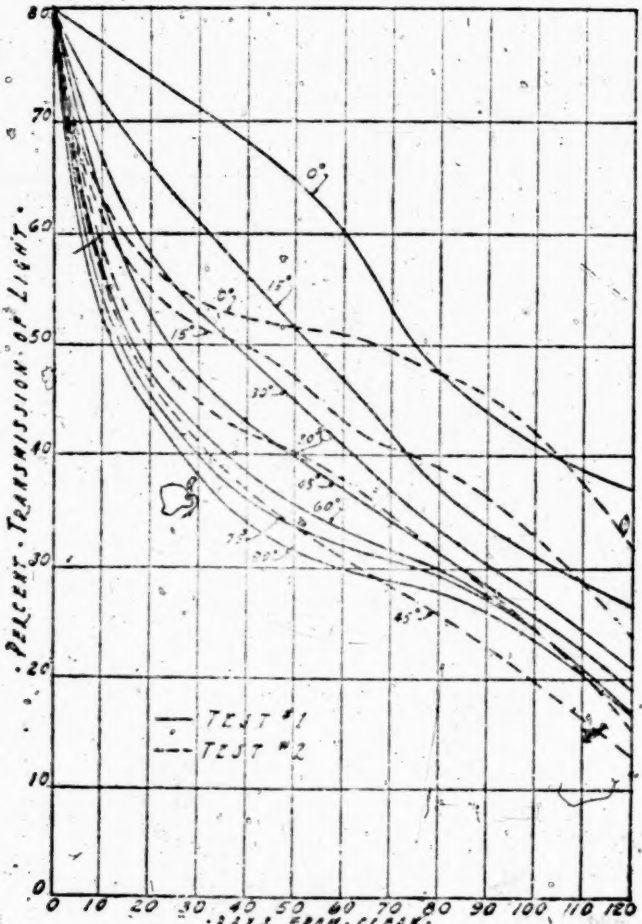

FIG. I — VARIATION OF TRANSMISSION FACTOR WITH TIME - TWO METHODS OF MEASUREMENT